No. 11767

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WALTER M. HEDER, a Minor, by his GUARDIAN AD LITEM, ALTA R. HEDER,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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Preliminary Statement.

Appellant has ignored the pleadings. Appellee contends that it will be simpler for the Court to arrive at a correct solution of the problems involved if a brief summary of the essential allegations made and omitted in the libel are called to the Court's attention.

Appellant alleges that on or about August 7, 1945, while discharging the duties of his employment and while acting within the scope of his employment he was required to man and control a niggerhead so as to raise, with the help of other crewmen, a boat to the deck of the vessel and that during said operation he was ordered to standby the niggerhead on the starboard side of said

vessel at the aftermost winch and at a particular time in the raising of the boat from the ocean to the deck of said vessel he *was given an order to hold the line with his hand on the niggerhead,* so as to permit the line, coiled around the spool, or niggerhead, to slip on the spool. In attempting to do this, the line, wrapped around the niggerhead and connected to the boat being pulled to the deck, instead of slipping on the spool, gripped the spool and continued to turn with the spool and it ground appellant's left thumb off at the first joint.

"That respondent was careless and negligent in its control of the operation of raising the particular boat at the aforesaid time and place to the deck of said ship at the time of libelant's accident and was more specifically negligent in the following particulars:

"1. In ordering this libelant to hold this line and keep it from turning on the aforesaid niggerhead at a time when the line was wet and would be apt to grab the libelant's hand as he attempted to hold it in place.

"2. In requiring this libelant and his fellow seamen to raise the boat to the deck of this ship by means of the starboard niggerhead on the ~~foremost~~ aftermost winch after the boatswain, Walter Raymond Owens had suggested to the first mate, Mr. John A. Bockleman, that they use the winch drum instead of the niggerhead. This suggested means of raising the boat to the deck was a more efficient and safer way of doing this work.

"That as an approximate (*sic*) result of the respondent's negligence, and because thereof, the libelant has suffered the loss of his left thumb, etc." (Ap. 4-5.)

Appellee, in its answer, admitted that on or about July 8, 1945, the libelant signed on the vessel mentioned as an able bodied seaman, at San Pedro, California, as an employee of respondent for an ocean voyage to Okinawa in the Pacific Ocean; that on or about August 7, 1945, the appellant was generally acting in the course of his employment and was generally discharging the duties of his employment, but denied the remaining allegations and each thereof in Article III of the libel. Appellee denied each and every allegation in Articles IV and V of the libel; denied that all or singular the premises are or any thereof is true, but admitted that the premises are within the Admiralty and Maritime jurisdiction of the United States and of the District Court of the United States, in and for the Southern District of California, Central Division; denied that appellant has been damaged in any sum whatsoever or at all.

As a separate and special defense, appellee alleged that on or about August 7, 1945, the libelant negligently and carelessly stood too close to operating machinery and negligently and carelessly placed his left thumb in a dangerous position and as a proximate result thereof the end of his left thumb was caught and pinched making it necessary for appellant to have the distal end of his left thumb amputated.

Libelant failed to allege that at the time of his injury he was a member of the crew employed on a United States vessel as an employee of the United States, through the War Shipping Administration.

His failure to allege that he was employed by the United States, through the War Shipping Administration, results in a fatal defect in his libel. No cause of action against the United States is stated unless the

libelant alleges that the libelant was, at the time of his injury, employed on a United States vessel as an employee of the United States, through the War Shipping Administration, for the reason that it is only such employees who have a right to prosecute an action for damages for personal injuries pursuant to the provisions of the Suits in Admiralty Act in the event the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. The libel alleges and the answer admitted that the vessel involved was at all times employed and engaged as a merchant vessel of the United States Merchant Marine. (Ap. 4 and 7.)

In support of appellee's contention that the libel fails to state facts sufficient to constitute a cause of action, please see the following cases:

Lopez v. United States, 59 Fed. Supp. 831;
Siclana v. United States, 56 Fed. Supp. 442;
Piascik v. United States, 65 Fed. Supp. 430.

In addition to the foregoing claimed fatal defect in the libel, appellee contends that it is very doubtful whether the trial court had jurisdiction over the subject matter. It is elementary that the United States of America is entitled to absolute immunity from suit or action of any kind either at law, in equity, or in admiralty, unless the United States has consented to be sued on the cause of action shown by the pleading to exist. The rules clearly require that any individual seeking to maintain an action of any kind against the United States must show by allegations of fact that his cause of action comes within some specific statute or combination of statutes pursuant to which the Congress has waived the sovereign immunity of the United States of America. It is also

the contention of appellee that unless the pleading shows such facts no court has any power to proceed and must of its own motion dismiss the action for lack of jurisdiction. The fact that the United States of America files an answer in any action commenced in any court, whether state or federal, does not establish or tend to establish that such court possesses jurisdiction to adjudicate the claimed dispute. The sovereign immunity of the United States cannot be created by resort to the fiction that when the United States files an answer it is presumed that the nation thereby consents to be sued and to abide by any judgment rendered. No officer, agent or employee of the United States of America, from the President of the United States down to a person possessing the minimum amount of authority as an agent of the United States, has the slightest power to waive the sovereign immunity of the United States or to consent that the United States be sued.

In support of appellee's contention that the District Court was without jurisdiction and that therefore the jurisdiction of this Court, being derivative, is likewise subject to serious question, please see:

Stanley v. Schwalby, 162 U. S. 255, 40 L. Ed. 916;

Minnesota v. United States, 305 U. S. 382, 83 L. Ed. 235;

United States v. Shaw, 309 U. S. 495, 84 L. Ed. 888;

United States v. Clyde Mallory Lines, 127 F. (2d) 569;

The Isonomia, 285 Fed. 516.

Appellant may advance the contention that statutes permitting seamen to sue the United States of America should be liberally construed even to the extent of asking this Honorable Court to amend such statutes under the guise of interpretation. Appellee's answer to any such contention is that all statutes waiving the sovereign immunity of the United States must be construed by recourse to exactly the same rules. If the rule were otherwise the courts would, by judicial fiat, usurp the functions of the Congress and place seamen in a more favorable position and grant to seamen privileges which cannot be enjoyed by claimants contending a right to recover war risk insurance, tax refunds, claims auditable in the General Accounting Office, claims under the Tort Claims Act and claims of various and sundry persons, firms and corporations who are entitled, when the proper conditions exist, to maintain suits in admiralty under the Suits in Admiralty Act and the Public Vessels Act.

Appellee directs this Court's attention to the decision of the Circuit Court of Appeals, 5th Circuit, in *Fox v. Alcoa S. S. Co.,* 143 F. (2d) 667. The United States Supreme Court denied a petition for certiorari in said case on December 18, 1944 and it can therefore be accepted as the last word of the highest court in the land upon the subject that the United States could not have been sued at all except for the provisions of the Act of March 24, 1943, 50 U. S. C. A. App. Sec. 1291(a) and that suit can be maintained *only* upon the terms it fixes.

Upon the basis of the foregoing argument and authorities appellee contends that the libel fails to state facts sufficient to constitute a cause of action or a case within the cognizance of the district court and that the said court was required, in any event, to dismiss the libel.

Questions Involved.

The appellant, on page 5 of his Opening Brief, contends that there are three questions involved in the case, as follows:

1. Was appellee negligent toward appellant?
2. Did appellee's negligence cause appellant's injury.
3. Was appellant negligent?

Appellee contends that these questions do not specify any point which can be asserted in a court of appellate jurisdiction. The actual questions, if proper assignments of error are made in a case of this kind, are:

1. Has the trial court erred in its findings on the issues raised by the pleadings?
2. Is there sufficient evidence in the record to legally support the findings actually made by the trial court?

The appellant is proceeding upon the theory that if there is any possible basis of liability shown by the testimony and other evidence introduced in the trial court, whether embraced within the general maritime rule that the employer is liable for injuries sustained in consequence of the unseaworthiness of a vessel or of a failure to supply and keep in order the appliances appurtent to the vessel, or pursuant to the terms of the Jones Act, which incorporated only those statutes of the United States which modify or extend the common law right or remedy of railway employees engaged in interstate or foreign commerce, then the trial court committed error in failing to find for the appellant even though he has utterly failed to prove the allegations of fact contained in his libel and upon which basis he invoked the powers of the district court to adjudicate his claim.

An examination of the Specifications of Error will show that the appellant is confusing the remedies which have been held by the United States Supreme Court to be inconsistent and as between which he was required to elect.

The United States Supreme Court has held, in the only cases where the point was involved, that a seaman injured in the course of his employment has the right to do one of two things: First he may prosecute a suit in admiralty or an action in a common law court for indemnity in consequence of the unseaworthiness of the vessel or of a failure on the part of his employer to supply and keep in order the proper appliances appurtenant to the vessel; or, second he may maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply.

Appellee contends that when a seaman files a suit predicated upon alleged negligence and the complaint or libel in such action alleges that the injury complained of resulted in whole or in part from the negligence of any of the officers, agents or employees of the employer of such seaman or by reason of any defect or insufficiency, due to its (the employer's) negligence in its appliances, boats or other equipment, such act on the part of such seaman constitute an election to maintain the action pursuant to the Jones Act.

> "Seamen may invoke, at their election, the relief afforded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both"
>
> *Plamals v. Pinar del Rio,* 277 U. S. 151, 72 L. Ed. 827.

"Any decisive action by a party with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these inconsistent conclusions."

U. S. v. Oregon Lumber Co., 260 U. S. 290, 67 L. Ed. 261;

See also: *Robb v. Vos,* 155 U. S. 13, 39 L. Ed. 52.

"The election for which it (Jones Act) provides is between the alternatives accorded by the maritime law as modified and not between that law and some non maritime system."

The Arizona v. Anelich, 298 U. S. 110, 80 L. Ed. 1075.

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, *at their election, either* the relief accorded by the old rules, *or* that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non maritime system." (Emphasis added.)

Panama Railroad Co. v. Johnson, 264 U. S. 375 68 L. Ed. 748.

"The right to recover compensatory damages under the new rule (Jones Act) for injuries caused by negligence is, however, an alternative of the right

to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by statute."

Pac. S. S. Co. v. Peterson, 278 U. S. 130, 73 L. Ed. 220.

"But we think that election required by the statute is sufficiently indicated where a person entitled to the benefit thereof, brings an action at law, alleging negligence and praying for damages."

Hammond Lumber Co. v. Sandin, 17 F. (2d) 760.

"The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act; and we need not determine whether, if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See Western Fuel Co. v. Garcia, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance, and, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, *has elected* to seek that provided by the new rules in an action at law based upon negligence,—in which he

not only assumes the burden of proving negligence, but also, under Section 3 of the Employers' Liability subjects himself to the reduction of the damages in proportion to any contributory negligence on his part."

Engel v. Davenport, 271 U. S. 33, 36; 70 L. Ed. 813, 816.

Appellee therefore contends that the appellant is in no position at this time to predicate any claim of recovery upon the assertion that the appellee was negligent in failing to provide "a safe place in which appellant was ordered to work." (App. Op. Br. 6.)

It has been held, and appellee contends the ruling was correct, that the maritime counterpart of the common law safe place to work doctrine is "unseaworthiness of the vessel."

"The ground on which the right to recovery is rested is that the pump was so defective as to render the ship unseaworthy as respects appellee, and to amount to a negligent failure of duty to supply and keep in order the proper appliances appurtenant to the ship—a duty analogous to the ordinary duty of a master to furnish his servant a safe place to work and safe appliances to work with."

Globe S. S. Co. v. Moss, 245 Fed. 54 at 55 (Cert. denied, 245 U. S. 663, 62 L. Ed. 537.)

Appellee reiterates the point that there is no allegation in Article IV of the libel, the charging part thereof, alleging any ~~claim~~ claimed defect or insufficiency due to the negligence of appellee in its appliances, boat, or other equipment. There are only two claimed acts of negligence set forth in the libel and neither relates to any alleged defect

or insufficiency in any part of the vessel or in any of the physical equipment or appliances appurtenant thereto.

In this case appellee deems it appropriate to call the attention of this Honorable Court to the fact that in an action prosecuted under the Jones Act there is no requirement that a place of work be absolutely safe. The Jones Act does not in and of itself specify any basis of liability. It is necessary, in order to ascertain what the grounds of liability may be, to examine and understand those portions of the Federal Employers' Liability Act which modify or extend the common law right or remedy in cases of personal injury to railway employees engaged in interstate of foreign commerce. The Jones Act does not support to embrace all of the provisions of the Federal Employers' Liability Act. The object of the Congress in enacting the Jones Act and incorporating therein by reference all statutes of the United States which modify or extend the common law right or remedy available to employees of interstate or foreign carries by railroad, was to create a liability on the part of employers of seamen for injuries proximately caused by negligence of the officers of the vessel or fellow crew members of the seamen. This was the only right which the Congress could have conferred upon such injured seamen in view of the fact that a seaman already had full and complete remedies in the event he was injured in consequence of the unseaworthiness of the vessel or a failure on the part of the employer to supply and keep in order the appliances appurtenant thereto. The seaman's right under the general maritime law in these last mentioned respects did not require any proof of negligence on the part of the employer but exonerated the employer from liability in the event the injury was proximately caused by negligence on

the part of fellow crewmembers including the master. (*Mahnich v. Southern Steamship Co.,* 321 U. S. 96, 88 L. Ed. 561.)

Pursuant to the Federal Employers' Liability Act, proof of an actual defect in a boat, equipment or other appliance, does not establish a *prima facie* case. Such law requires the injured employee to allege and prove by a preponderance of substantial evidence that such condition not only existed but was due wholly or in part to negligence. Appellee also contends that the only duty on the part of an employer under the Federal Employers' Liability Act is to furnish a boat, equipment or appliance which is reasonably safe when used for an intended purpose by an ordinarily intelligent employee.

In further support of appellee's contention that the appellant has confused the two inconsistent remedies hereinabove referred to, appellant cites the decisions of the United States Supreme Court in *Mahnich v. Southern Steamship Co.,* 321 U. S. 96 and *Seas Shipping Co. v. Sieracki,* 328 U. S. 85. These decisions have nothing whatever to do with actions prosecuted or which could have been prosecuted under the Jones Act. In the *Mahnich* case the seaman predicated his claim exclusively upon the general maritime law without reference to the Jones Act. In the *Seas Shipping Company* case the libelant was a longshoreman and as such he could not have prosecuted any action under the Jones Act against the Seas Shipping Company for two obvious reasons: 1. He was not an employee of the Seas Shipping Company and (2) He was not a seaman as that word is used in the Jones Act.

Appellant Failed to Prove the Allegations of His Libel With Reference to Claimed Negligence.

The appellant testified that: While the ship was just off the Island of Okinawa he was engaged with other seamen in raising a motor life boat, having received his orders from the bos'n of the ship; that the boat falls were led from the davits to the snatch block on the boat deck, then to the crosstree on the mizzenmast to another snatch block, then to another snatch block alongside No. 5 hatch and then to the niggerhead on the after windlass at which position he was standing. [Rep. Tr. 4-6.]

At the time of the accident I was behind the niggerhead and was given the order by the hatch tenders, who were on the boat deck and the catwalk above No. 5 hatch, to surge the line. I was not given an audible order but it was indicated by the man on the boat deck with his hand to "avast heaving" which means stop the raising of the boat. My position would be to stop the line from gripping the niggerhead by surging it so that it would not come any further. I surged the line until the accident happened. [Rep. Tr. 8-10.]

I had to see that the line came off of the niggerhead with a straight lead and fell on the deck in the proper place and also see that the line remained on the niggerhead and kept a steady strain on the boat falls. The man on the port niggerhead and myself on the starboard niggerhead had the duty to surge the line to keep it from heaving. When you surge a line that loosens it on the niggerhead so that it will not grab and pull it. [Rep. Tr. 13-14.]

The considerations which determined me to put more or less turns around the niggerhead were that the weight being lifted by the winch naturally would govern the

number of turns. The more the weight the more turns you would have to put around the niggerhead to hold that fast or to keep it heaving. A few number of turns would tend to surge itself without strain on the hauling part, that is, the loose end of the line coming off the niggerhead. It would be easier to get out of control if the weight was lessened by some action on the boat. [Rep. Tr. 15-16.]

I would say I had five turns around the niggerhead most of the time. The rope was a 3-inch line. I imagine it would be pretty wet by that time because it was squally weather. It is subject to weather at all times, and it was equally at the time. The boat falls are always kept new. They were renewed at the beginning of the trip or during the first part of the voyage.

The way in which I surged this line to keep it from turning on this spool was I placed my hand on the turns, on the niggerhead by a slight pressure; that is all that is needed on any amount of turns, just to hold it in the opposite direction as it is turning; it will surge the line so that it will remain on the spool and not grab it and turn. I used my left hand to do that. I always have my right hand on the hauling part of the rope or the loose end that was coming off the winch or the niggerhead; my left hand was on the coil of rope that was twisted around the spool.

An order was given by the Chief Mate to the Bos'n to raise this boat before I started this operation. [Rep. Tr. 17-18.]

On the day of the accident I lost my thumb. We had been to Buckner Bay and returned to the vessel and the Bos'n appointed men to stay in the boat, men to man

the winches and the proceedings for raising the boat were immediately begun. He said "Heder, take the starboard niggerhead. Curley, take the port," and he named the hatch tenders. We went to our stations and as soon as the hatch tenders indicated, we started the winch. [Rep. Tr. 21.]

We took our turn and started heaving and followed the hatch tender's motion from then on. His hands were in motion at all times that the boat is in motion. If they want to go down, naturally they will change it. He has to motion where the boats can go. He indicated by his hands that the boat was stopped. There was a "stop heaving;" so I put my hand on to surge the lines. There is five lines that it was necessary "to throw them off, and at that speed, at the speed of the command or indication he gave, I had to do the operation quickly. So the first thing you do is to surge it with your hand and throw off your lines." I didn't throw them all off. I had at least four remaining on. I was surging. The line jumped, looped over my thumb, the first joint, and twisted it off in between the lines. [Rep. Tr. 23.]

I heard the Bos'n ask the Mate "Why not lead the boat falls to the No. 4 winch instead of the after niggerhead." I don't know of any reply made by the Mate. He just rebuked the suggestion.

Before raising this particular boat there had been similar discussions between the Bos'n and the Chief Mate regarding the manner in which they raised this boat. I heard similar discussions. I was always near the Bos'n. He liked me to be on that niggerhead, and for some reason I was always stationed there. I did hear several times that the Bos'n wanted to change the affair "so that there wouldn't be all these men needed to operate

the boat so that some could go to chow and others could work."

The manner in which the boat could have been raised with the No. 4 winch drum would have been the same. The boat would have raised the same way, except that it would have been a faster operation with less line used and one man to operate the winch and one hatch tender to guide his actions. The winch handle would be the only operation to handle, nobody handling the lines at all except those who tie it off after the boat is two-blocked. If that operation were used it is not wholly correct to say there wouldn't be any surging of the lines at all or that no man would have to touch the lines. They would have to touch the line to fasten it on the boat, and they would have to tie it off. Where it is winding on the winch, somebody would touch the line. [Rep. Tr. 26-29.]

My thumb was between two lines, but it was pressed down towards the niggerhead, the surface of the metal with the action of the rope. I don't know if I had five turns around this niggerhead at all times. I was continually taking it off and putting it on. It was an average of about five turns. When I got the order to surge I don't think I took off some of the turns. [Rep. Tr. 32.]

Note: During the cross-examination of appellant, the witness illustrated his testimony by a demonstration for the purpose of showing the trial judge what happened and how it happened. This demonstration, of necessity, must remain a mystery in so far as this Honorable Court is concerned but, nevertheless, it must be presumed in an appellate court that the demonstration furnishes substantial support for the finding of the court that there was a

failure of proof of negligence on the part of the appellee. [Rep. Tr. 34, lines 13 to 36, line 1.]

In performing this operation, that is in the manner in which I chose to do it, I relied on my own judgment, and what I was taught at the Maritime School on Catalina Island. No officer on board this particular vessel told me to put my hand on top of the line when I was going to surge it. [Rep. Tr. 36.]

The appellee offered in evidence the deposition of Thomas F. Gresham, the master. This deposition is contained in the Apostles on Appeal, pages 48 to 69.

The master testified that: In operating a niggerhead, in good seamanship, one never places one's hand near a line around a niggerhead where there is about to be a strain. You should stay at least two to three feet away from the niggerhead. If necessary to surge, turns should be backed off and the line slacked with one or two turns where there is no strain, particularly when there is a possibility of a strain coming on the line, and that in order to take off turns of line which may be around the niggerhead it is not necessary for the man doing that operation to touch the niggerhead at all or to put his hand on top of the rope while it is on the niggerhead and in order to accomplish that operation in good and careful seamanship he would have the hauling part in his right hand, which he would merely throw the turns off, reaching outside the niggerhead thus, in a circular motion and that could be done without getting close enough to the niggerhead to get your hand caught in it, or anything of that kind.

"Q. Well, now, is there any reason why a line should not be wrapped around the winch drum in

an operation such as was being conducted on the day of the accident?

"A. Oh, this particular winch, there was no need for the drum and the drum is greased, and the manila is never taken to the drum. The niggerhead is purposely designed to handle manila rope."

That is the kind of line they were using for this operation. The drum is designed to handle wire cable. It would not be practicable to use a wire ~~eagle~~ cable for the purpose of hoisting the small boats aboard, or lowering them into the water, on this type of boat fall. This boat fall equipment is inspected by the U. S. Steamboat inspectors and are laid down according to their specifications. It was necessary to use the manila line. (Ap. 53-54.)

Basing my answer on my experience at sea, the manner in which the chief mate rigged these lines or ordered them rigged was in accordance with the standards of good seamanship. The accident was due to the carelessness of the injured in practicing poor seamanship in placing his hand on the niggerhead. Even a poor sailor working around a niggerhead would never put his hand anywhere near a niggerhead when it is moving because it is dangerous to put your hand on any moving machinery. (Ap. 55-56.)

I have seen a few seamen put their hands on rope that is being turned by a niggerhead, in order to hold that rope and keep it from moving with the niggerhead, but they didn't hold their fingers there long. They usually were broken of the habit.

I do not think that if this line had five loops around that niggerhead, that it would be possible to surge the

line quickly by means of slacking it back. You couldn't surge it in that manner if there were five loops around it; you should take at least three to four off. (Ap. 64.)

The foregoing testimony demonstrates that the findings made by the Honorable trial judge are fully supported by the evidence and that the final decree dismissing the libel on the merits was and is fully justified.

Conclusion.

Appellee contends that there is no legal ground upon which the decree of the District Court should be interfered with and that it should be affirmed.

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